Supreme Court, U. S.
FILED
JUL 16 1979
MICHAEL RODAK, JR., CLERK

No.____

In The Supreme Court of the United States

OCTOBER TERM, 1978

79-81

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

ALLAN A. RYAN, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN ANN CLAUSS
Solicitor of Labor

RONALD G. WHITING
Associate Solicitor

WILLIAM H. BERGER
Attorney
Department of Labor
Washington, D.C. 20210

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutory provisions involved	2
Statement	3
Reasons for granting the petition	6
Conclusion	10

CITATIONS

Cases:

Accardi v. *Pennsylvania R.R.*, 383 U.S. 225	5
Akers v. *General Motors Corp.*, 501 F. 2d 1042	7, 8
Alabama Power Co. v. *Davis*, 431 U.S. 581	6, 7, 9, 10
Foster v. *Dravo Corp.*, 490 F. 2d 55, aff'd, 420 U.S. 92	6, 7, 8, 10
Franks v. *Bowman Transportation Co.*, 424 U.S. 747	10
Thornhill v. *Ormet Corp.*, 84 Lab. Cas. ¶10,786	8, 9

Statute:

Vietnam Era Veterans' Readjustment Assistant Act of 1974, 38 U.S.C. 2021 *et seq.*:	
38 U.S.C. 2021	2, 5
38 U.S.C. 2021(b)(2)	6
38 U.S.C. 2022	1, 6

Miscellaneous:

J.M. Becker, *Guaranteed Income for Unemployed—The Story of SUB* (1968).	10

Page

S. Slichter, J. Healy and E. Livernash, *The Impact of Collective Bargaining on Management* (1960) 10

U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 2013, *Characteristics of Major Collective Bargaining Agreements* (Feb. 1979) 7

In The Supreme Court of the United States

OCTOBER TERM, 1978

No.

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Thomas E. Coffy,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–2a) is reported at 85 Lab. Cas. (CCH) ¶11,012. The court's order is reported at 590 F.2d 334. The opinion of the district court following remand (App. B, *infra*, 3a–11a) is reported at 461 F. Supp. 344. The first opin-

[1]The Department of Justice represents petitioner pursuant to 38 U.S.C. 2022.

ion of the court of appeals (App. C, *infra*, 12a) is unofficially reported at 82 Lab. Cas. ¶10,071. The first opinion of the district court (App. D, *infra*, 13a–30a) is unofficially reported at 77 Lab. Cas. ¶11,158.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1978, and a petition for rehearing was denied on February 16, 1979 (App. E, *infra*). On May 9, 1979, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including June 15, 1979, and on June 6, 1979, Mr. Justice Stewart further extended the time to and including July 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether supplemental unemployment benefits provided in the steel industry collective bargaining agreement are perquisites of seniority to which a returning veteran is entitled under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*

STATUTORY PROVISIONS INVOLVED

38 U.S.C. 2021 provides in pertinent part:

> (a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing

> after discharge for a period of not more than one year—
>
> * * * * *
>
> (B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—
>
> (i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay * * *.
>
> * * * * *
>
> (b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.
>
> (2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in [his] employment as [he] would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

STATEMENT

1. Petitioner was employed by respondent as a crane operator for about four months in 1968, and again from January 24, 1969, until he left to enter military service on September 9, 1969. He served in the military until August 16, 1971, when he was honorably discharged (App. D, *infra*, 19a).

Petitioner timely applied for reinstatement to his previous position on September 14, 1971. Petitioner was reinstated, but because he would have been laid off by that date had he remained continuously employed with respondent, he was immediately placed in a layoff status. Petitioner was subsequently recalled to work on July 1, 1972. During the period of layoff, petitioner received supplemental unemployment benefits (SUB) from respondent for 25 weeks (App. D, *infra*, 19a–20a).

The supplemental unemployment benefits plan, created by the collective bargaining agreement between the major steel companies (including respondent) and the United Steelworkers of America, provides weekly payments to employees laid off from work. The benefits supplement unemployment compensation to which the employee is entitled under state law. The length of time during which an employee receives SUB benefits while on layoff is determined by the number of credit units he has accumulated prior to layoff. Under the plan, an employee accrues one half credit for each week in which he has any of the following hours:

> a. hours worked for the company;
>
> b. hours not worked but for which he is paid, such as vacation hours or hours for which he received jury allowance;
>
> c. hours not worked and not paid for but which were lost because:
>
> (1) he was performing his duties as a local union officer; or

> (2) he was absent because of disability for which benefits are payable under a workmen's compensation or occupational disease law, or under the company program of insurance benefits.

A maximum of 52 credit units may be accrued by an employee at any one time. He uses one credit unit for each week he is paid supplemental unemployment benefits (App. D, *infra*, 18a).

The SUB plan also provides (App. D, *infra*, 17a–18a):

> If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purpose of the Plan to be on leave of absence and shall not be entitled to any Benefit.
>
> Only the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may be otherwise required by law.

Thus, under the plan, upon his reemployment after military service petitioner was credited with the 25 credit units he had accumulated prior to his entering military service, but he was not accorded any additional credit units for the period he spent in military service. The parties agreed that if petitioner had not entered military service, he would have accumulated the maximum of 52 credit units and thus would have received SUB benefits for the entire nine and a half months he was on layoff status (App. D, *infra*, 20a).

2. Petitioner filed suit in the United States District Court for the Northern District of Ohio, alleging that respondent violated the veterans' reemployment provisions of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. 2021 *et seq.*, by refusing to consider his military service time in computing the amount of SUB credit units he had accumulated. Petitioner al-

leged that supplemental unemployment benefits are a "perquisite of seniority" (*Accardi* v. *Pennsylvania R.R.*, 383 U.S. 225, 230 (1966)) under the Act since they represent protection against economic loss in much the same way as seniority. Thus, he claimed that upon his return to his civilian employment, his amount of SUB credit units should have been computed "as * * * if [he] had continued in such employment continuously from the time of [his] entering the Armed Forces until the time of [his] restoration to such employment" (38 U.S.C. 2021(b)(2)).

The district court, relying on *Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975), entered summary judgment for respondent, holding that the SUB credits were accumulated based on a " 'work requirement that constitutes a bona fide effort to compensate for work actually performed' " (App. D, *infra*, 23a). While the case was pending on petitioner's appeal to the Sixth Circuit, this Court decided *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977), holding that pension benefits are a perquisite of seniority under the Act and thus that the time spent in military service must be credited toward an employee's benefits. The court of appeals sua sponte vacated the district court's judgment and remanded the case for reconsideration in light of *Alabama Power* (App. C, *infra*, 12a).

On remand, the district court reaffirmed its original decision that SUB credits are not seniority rights entitled to the Act's protection. It reiterated that "SUB benefits are 'in the nature of short term compensation for services rendered' and 'not an aspect of seniority within the coverage of' " the Act and that "entitlement to SUB benefits 'require[s] more than continued status, such as a work requirement demanding actual performance on the job' " (App. B, *infra*, 7a–8a).

The court of appeals affirmed "for the reasons set forth in [the] second opinion for the district court" (App. A, *infra*, 2a).

REASONS FOR GRANTING THE PETITION

1. As the court of appeals apparently recognized (see App. A, *infra*, 2a), its decision is in conflict with *Hoffman* v. *Bethlehem Steel Corp.*, 477 F.2d 860 (3d Cir. 1973),[2] and *Akers* v. *General Motors Corp.*, 501 F.2d 1042 (7th Cir. 1974). In those cases, the Third and Seventh Circuits held that supplemental unemployment benefits are perquisites of seniority and thus that the returning veteran is entitled to SUB payments based on the credits he would have accumulated but for his absence in military service.

Approximately 1,700,000 employees are covered by collective bargaining agreements that provide supplemental unemployment benefits. This figure includes approximately 390,000 employees in the primary and fabricated metals industry, 745,000 employees in the automobile industry, 156,000 employees in the nonelectrical machinery manufacturing industry, and 123,000 employees in the apparel industry. See U.S. Bureau of Labor Statistics, Dep't. of Labor, Bull. No. 2013, *Characteristics of Major Collective Bargaining Agreements* 79 (Feb. 1979). There are no readily available statistics to show how many of these employees are (or might become) returning veterans whose benefits would be truncated by the decision below or others that may follow it. What is certain, however, is that, unless this Court resolves the conflict among the circuits, veterans who work in the same industry under the same collective bargaining agreement—indeed, even for the same employer—will find that their entitlement to full SUB credits and the substantial protection against economic injury they afford depends upon the circuit in which their plant is located.[3]

---

[2]See also *Foster* v. *Dravo Corp.*, 490 F.2d 55 (3d Cir. 1973), aff'd, 420 U.S. 92 (1975).

[3]The Third, Sixth and Seventh Circuits house the heaviest concentration of plants within the steel industry.

2. In addition to creating a conflict among the circuits, the court of appeals' decision is wrong. As the Court recently explained in *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 589, there is a two-fold test "for determining whether a benefit is a right of seniority secured to a veteran by" the Act. Under this test, a fringe benefit is a right of seniority if (1) it would have accrued with "reasonable certainty" had the veteran been continuously employed with his private employer instead of entering military service, and (2) it is, by its "real nature," a reward for length of service rather than short-term compensation for services rendered.

The first aspect of the test is met here, for the parties agreed that petitioner would have accrued the maximum of 52 SUB credits by the time of his layoff if he had not entered military service (App. D, *infra*, 20a). Moreover, supplemental unemployment benefits are, by their "real nature," inducements to, and rewards for, long service. As the Third Circuit stated in *Foster* v. *Dravo Corp.*, 490 F.2d 55, 59 (1973), aff'd, 420 U.S. 92 (1975), in explaining its decision in *Hoffman* v. *Bethlehem Steel Corp.*, *supra:*

> Unlike vacation benefits, the protection which the SUB plan furnishes is part of an employee's job security interest. The SUB plan is designed to and in fact does give the employee assurance that throughout his employment he not only earns his take home pay, but also accumulates assurance that, if exigencies of business require that he be laid off, he will have income for some period of time. The plan is a way of conferring, in diminished stature, one of the chief advantages of seniority, protection against economic loss in a period of diminishing employment. The SUB plan thus has as its purpose and effect the extension of a seniority-type protection to employees who, due to their relatively short length of service with the company, would formerly have been unprotected. Therefore, [38 U.S.C. 2021], interpreted in the light of its overall purpose and applied to give effect to evolving practice in labor relations, can fairly be said to require that the returning veteran be accorded this seniority-type advantage.

See also *Akers* v. *General Motors Corp.*, *supra*, 501 F.2d at 1045 n.11; *Thornhill* v. *Ormet Corp.*, 84 Lab. Cas. ¶10,786 (S.D. Ohio 1978).

Respondent counted petitioner's time in military service toward the two-year SUB eligibility period (as indeed it was required to do since that two-year period is manifestly a seniority requirement (see *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 593)), yet it refused to give him any SUB credits beyond those he had earned by the day he left respondent's employ to join the military. This anomalous treatment of petitioner's military service is unjustified; it treats military service as "time on the job" for one SUB purpose but not another. Moreover, SUB satisfies the same needs of the employers that pensions do, albeit on a smaller scale. It encourages retention on the job rolls of the most senior employees on layoff and thus "reduce[s] * * * turnover and training costs and help[s] an employer secure the benefits of a stable work force." *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 594.

Furthermore, SUB payments are not awarded pro rata; an employer who is laid off just prior to his second anniversary receives nothing, while an employee laid off just afterwards receives the maximum benefit. And the amount of benefits is largely calculated on the size of the employee's family, a factor wholly unrelated to the work done. See *Thornhill* v. *Ormet Corp.*, *supra*, 84 Lab. Cas. at 19,018.

The district court below, upon whose decision the court of appeals relied, did not analyze these functions of SUB payments "in the employment system" (*Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 594). Instead, it reaffirmed its previous approach that the existence of a bona fide or substantial work requirement automatically eliminates a benefit from the Act's

protection. But as this Court observed in *Alabama Power* (431 U.S. at 592), "[e]ven the most traditional kinds of seniority privileges could be as easily tied to a work requirement as to the more usual criterion of time as an employee. * * * We must look beyond [this] overly simplistic analysis * * * to the nature of the payments."

In sum, when the *Alabama Power* analysis is applied to supplemental unemployment benefits at issue here, it is clear that the court of appeals' decision is incorrect. SUB credits are "in the nature of a reward for length of service" (431 U.S. at 589), because they "confer[ ], in diminished stature, one of the chief advantages of seniority, protection against economic loss in a period of diminishing employment." *Foster* v. *Dravo Corp.*, *supra*, 490 F.2d at 59. Thus they are perquisites of seniority entitled to protection under the Act. See Also *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 766, 782 n.1 (1976); J.M. Becker, *Guaranteed Income for Unemployed—The Story of SUB* (1968); S. Slichter, J. Healy and E. Livernash, *The Impact of Collective Bargaining on Management* 458–459 (1960).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALLAN A. RYAN, JR.
Assistant to the Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

RONALD G. WHITING
Associate Solicitor

WILLIAM H. BERGER
Attorney
Department of Labor

JULY 1979

APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

No. 78-3266.

December 12, 1978.

THOMAS E. COFFY, PLAINTIFF-APPELLANT

v.

REPUBLIC STEEL CORPORATION,
DEFENDANT-APPELLEE.

Before WEICK and CELEBREZZE, Circuit Judges, and PECK, Senior Circuit Judge.

WEICK, C.J.: This case is before this Court for the second time. The issue presented is whether Supplemental Unemployment Benefits (SUB) provided by defendant are incidents of seniority protected under the Military Selective Service Act of 1967, recodified in the Vietnam Era Veterans' Readjustment Act of 1974, 38 U.S.C. §§2021, *et seq.* The district court originally held that the SUB payments were not protected under the Act and entered judgment for defendant. In an unpublished order dated July 12, 1977, No. 76-1160, this Court vacated the judgment of the district court and remanded the cause for reconsideration in light of *Alabama Power Co. v. Davis*, [81 LC ¶13,255] 431 U.S. 581 (1977), decided after entry of the district court's judgment.

On remand, the district court adhered to its original position and reaffirmed its entry of judgment in favor of

defendant. The cause was resubmitted to this Court on the briefs and oral arguments of counsel and the Court has studied the record and is fully advised in the premises.

The Court is of the opinion that the SUB payments are not protected by the Act for the reasons set forth in Judge Thomas' second opinion for the district court. *See Aiello v. Detroit Free Press, Inc.*, [83 LC ¶10,335] 570 F.2d 145 (6th Cir. 1978). *But see Akers v. General Motors Corp.*, [74 LC ¶10,239] 501 F.2d 1042 (7th Cir. 1974); *Hoffman v. Bethlehem Steel Corp.*, [70 LC ¶13,562] 477 F.2d 860 (3d Cir. 1973).

It is therefore ordered that the judgment of the district court be, and it hereby is, affirmed.

APPENDIX B

THOMAS E. COFFY, PLAINTIFF,

v.

REPUBLIC STEEL CORP., DEFENDANT.

Civ. A No. C74-217.

UNITED STATES DISTRICT COURT,
N.D. OHIO, E. D.

March 15, 1978.

MEMORANDUM AND ORDER

WILLIAM K. THOMAS, District Judge.

Following the decision of the United States Supreme Court in *Alabama Power Co. v. Davis*, 431 U.S. 581, 97 S.Ct. 2002, 52 L.Ed.2d 595 (5th Cir., June, 1977) the United States Court of Appeals for this circuit vacated this court's judgment in favor of the defendant and remanded the case for reconsideration in light of *Alabama Power*. In the last paragraph of its memorandum and order of August 29, 1975, this court summarized its ruling:

> Qualification for SUB [Supplemental Unemployment Benefits] credit units does not depend upon mere passage of time. During his period of military service it is determined that plaintiff did not automatically accrue SUB credit units, as a "perquisite of seniority." Consequently, section 7.2 of the SUB Plan barring the plaintiff from receiving SUB credit units during his period of military service is valid and enforceable under section 9(c)(1) of the Act. [P. 17, original memorandum.]

Applying section 9 of the Military Selective Service Act, 50 U.S.C. §459, the Supreme Court in *Alabama*

Power determined that an employee resuming employment after military service is entitled to "credit toward his pension for his period of military service." The court considered "Davis' right to pension credit for his years in the military in light of" principles derived from prior cases relating to seniority rights under section 9 of the Act. After reviewing its most recent cases, *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966) and *Foster v. Dravo Corp.*, 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d 44 (1975),[1] the Court thus stated their essence:

> . . . our cases have identified two axes of analysis for determining whether a benefit is a right of seniority secured to a veteran by §9. If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a "perquisite of seniority." If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short term compensation for services rendered, it is not an aspect of seniority within the coverage of §9.

[1] Treating Accardi's veteran's right to severance pay under the collective bargaining contract as a "perquisite of seniority," the Court thus summarized its decision:

> While questioning the company's argument because of the "bizarre results possible under the definition of 'compensated service,' *id.* [383 U.S.], at 230 [86 S.Ct., at 771], we rejected it because the 'real nature' of the payments was compensation for the lost rights and expectations that accrued as the employees' longevity on the job increased.

431 U.S. at 588, 97 S.Ct. at 2006.

Foster v. Dravo Corp. dealt with a veteran's claim for vacation pay. Foster worked for Dravo for the first seven weeks of 1967, spent eighteen months in military service, and returned to work for the last thirteen weeks of 1968. Although the collective bargaining agreement required twenty-five weeks of work in a calendar year to receive full vacation benefits, plaintiff Foster claimed entitlement to vacation pay for both 1967 and 1968. The Supreme Court in *Alabama Power* said of its holding in *Foster*:

In *Alabama Power*, the Court had no trouble finding that "the reasonable certainty" requirement of earlier veteran's rights ruling in *McKinney v. Missouri K–TR Co.*, 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed.2d 1305 (1958), and *Tilton v. Missouri Pac. R. Co.*, 376 U.S. 169, 84 S.Ct. 595, 11 L.Ed.2d 590 (1964), had been met. The Court noted that "[r]espondent's [Davis's] work history both before and after his military tour of duty demonstrates that if he had not entered the military, he would almost certainly have accumulated accredited service for the [relevant] period." Similarly, in Coffy's case, as recognized in this court's memorandum of August 29, 1975, "the parties agree that plaintiff Coffy would have been entitled to 52 [the maximum] SUB credits at the time of his layoff had he been working at Republic rather than engaged in military service."

Turning to the "nature of the benefit itself," the second "ax[is] of analysis" to be considered, the Supreme Court confronted Alabama Power's argument that:

> Again focusing on the nature of the benefit at issue, we rejected Foster's claim. Vacation benefits, we held, are "intended as a form of short term compensation for work performed," *id.* [420 U.S.], at 100 [95 S.Ct., at 854], not as a reward for longevity with an employer. In reaching this conclusion, we noted the work requirement imposed by the collective-bargaining contract, the proportionate increase in vacation benefits that resulted from overtime work, and the availability of pro rata benefits if an employee was laid off before he had worked the required number of weeks. These facts however, were sufficient only to "lend substantial support," *id.*, at 100 [95 S.Ct., at 884] to the employer's argument that the vacation benefits were a form of pay for work done. The nature of the benefits—"the common conception of a vacation as a reward for and respite from a lengthy period of labor," *id.*, at 101 [95 S.Ct. 879],—was decisive.

431 U.S., at 589, 97 S.Ct. at 2007.

> [P]ension payments should be viewed as compensation for service rendered like the vacation payments in *Foster*, rather than as a perquisite of seniority like the severance payments in *Accardi*.

While agreeing that "pension payments have some resemblance to compensation for work performed," the Court concluded:

> Other aspects of pension plans like the one established by petitioner suggest that the "true nature" of the pension payment is a reward for length of service. The most significant factor pointing to this conclusion is the *lengthly period required for pension rights to vest in the employee*. It is difficult to maintain that a pension increment is deferred compensation for a year of actual service *when it is only the passage of years in the same company's employ, and not the service rendered, that entitles the employee to that increment*. [Emphasis added.]

Thus, the Court determined that pension benefits are a perquisite of seniority; and military service counts as part of the employee's continuous service.[2]

What then is the "true nature" or "real nature" of the SUB benefit sought by Coffy under the Collective Bargaining Plan established by the United Steel Workers and Republic Steel?[3] The purpose of the SUB plan was thus described in the original memorandum:

---

[2]The Pension Agreement, Section 5.1(b)(4) between Republic Steel Corporation and United Steel Workers of America expressly recognizes what *Alabama Power* decided; namely, that continuous service, essential to establish pension eligibility, is not broken by military service.

[3]In overruling plaintiff's motion for reconsideration of the court's judgment of August 29, 1975, this court stated that "the court's opinion did treat—and in sufficient detail, it is believed—the 'real nature' of the SUB credits under consideration, as the court understands the meaning and present applicability of this term."

> The plan supplements "state system unemployment benefits" and provides "other benefits related to unemployment."
>
> * * * * *
>
> A "benefit" under the plan includes "a Weekly Benefit, Short Week Benefit, or relocation allowance." Plaintiff's [Coffy's] claim for additional credit units involves Weekly Benefits. [P. 4, original memorandum.]

This court posed the issue:

> The decision in this case, applying the essence of *Foster*, turns on whether the Plan's SUB credit units are "designed to measure time on the payroll rather than hours on the job," and whether the qualification for credit units is a "work requirement [that] constitutes a bona fide effort to compensate for work actually performed." [P. 10, original memorandum.]

Applying *Foster*, the court analyzed this SUB plan upon the full evidentiary record developed at the trial and concluded:

> "[H]ours worked for the Company" in any week, the first qualification for earning a ½ credit unit, meets the *Foster* test of a "work requirement." It constitutes a bona fide effort to relate qualification for weekly benefits under the SUB Plan to work actually performed, as is designed to measure "hours on the job" rather than "time on the payroll." [Pp. 11–12, original memorandum.]

A covered Republic Steel employee depletes his SUB credits by receiving benefits during a layoff due to unemployment. Upon resuming employment, his weekly hours of work or wage substitutes (as explained in the original memorandum) rebuild his credits back to the maximum level of fifty-two credits (fifty-two weeks). Thus, this court concludes that SUB benefits are "in the

nature of short term compensation for services rendered" and "not an aspect of seniority within the coverage of §9," *Alabama Power, supra*, 431 U.S. at 589, 97 S.Ct. at 2007. Or in the words of *Aiello v. Detroit Free Press, Inc.*, 570 F.2d 145 (6th Cir., 1978) (a section 9-vacation pay case), entitlement to SUB benefits "require[s] more than continued status, such as a work requirement demanding actual performance on the job."

Moreover, the completion of "two years of continuous service prior to his lay-off" (a universal requirement of eligibility) does not relate the benefits to length of service, as plaintiff argues, since the same minimum period applies equally to all employees. Hence, judged by their "real nature," SUB benefits are not perquisites of seniority.

Plaintiff cites *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a Title VII case that, among other things, held that an award of seniority retroactive to the date of an individual job application was appropriate under Title VII's objective of making persons whole for injuries suffered on account of unlawful employment discrimination. The majority opinion in *Franks* recognizes that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this nation." While the majority opinion speaks separately of "competitive status" seniority and "benefit" seniority,"[4] this distinction was not germane to the Court's ruling, and the Court did not decide the present issue of whether SUB benefits are a perquisite of seniority

[4]Note 1 to Judge Powell's concurring opinion, referring to "Benefit" type seniority lists as examples "pensions, paid vacation time, and unemployment insurance." This dictum cannot effect the present case. The Court in *Foster v. Dravo Corp., supra*, specifically has held that section 9 seniority rights do not apply to "paid vacation time;" and the generalized mention of "unemployment insurance," not spoken in a section 9 context, offers no authority in this case.

under section 9 of the Universal Military Training and Service Act of 1948. The Court's references to section 9 and cases decided under that section were rather to support the Court's holding "that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Id.* at 778, 96 S.Ct. at 1271.

Citing *Hoffman v. Bethlehem Steel Corp.*, 477 F.2d 860 (3rd Cir. 1973), and *Akers v. General Motors Corp.*, 501 F.2d 1042 (7th Cir. 1974), the plaintiff states:

> In the only two appellate decisions addressing the precise issue involved in this case, the Third and Seventh Circuits have held that SUB benefits constitute "perquisites of seniority" entitled to the protection of the Act.

This court reaffirms its refusal to follow *Hoffman* on the grounds and for the reasons stated at pp. 14–17 of its original memorandum of August 29, 1975. In part, this court in that opinion pointed out:

> Section 2.0 of the Bethlehem SUB Plan thus construed is identical with section 2.0 of the Republic SUB Plan. However, it is apparent that the court of appeals interpreted section 2.0 without benefit of the factual record developed in the present case. The facts relating to the steel industry received by this court are not mentioned in either the opinion of the court of appeals or the opinion of Judge Gourley, 335 F.Supp. 968 (W.D.Pa.1972)
>
> Circumstances existing in the steel industry, as revealed by the uncontradicted evidence in this case, demonstrate that, in practice, the minimum workweek is 32 hours. Therefore, it was unrealistic for the court of appeals to say in *Hoffman* that the SUB Plan makes "distinction . . . between an employee who works 1 hour during the week and one who works 40 hours during the week." The Plan must be construed in light of actual conditions in

the steel industry. The possibility of an employee working only one hour during any week does not exist. Yet upon this hypothesis, the court concludes that "when the plan is analyzed, the same 'bizarre results' are possible under Bethlehem's plan as were possible under *Accardi*." Given the universal employment practices of the steel industry the "bizarre results" of *Accardi* could not have occurred at Bethlehem, and have not occurred at Republic, as the facts disclose.

Akers involved a General Motors SUB plan that differed in an important respect from the steel industry SUB plan. The Seventh Circuit, describing the General Motors plan, stated:

> Credit units are accrued "for each Work Week for which an Employee receives any pay from the Company" and for work weeks "for which he does not receive pay from the Company but for which he receives a [so-called] Leveling Week Benefit." So that whether an employee actually works or not, one-half credit accrues to his benefit each week.

Id. at 1044. This provision of the General Motors Sub plan was crucial to the *Akers* decision. The *Akers* court stated:

> Under GM's contention here, an employee in a layoff status and doing no actual work is entitled, under the bargaining agreement, to accrue leveling week benefit credits; yet a veteran, also doing no actual work, is precluded by the Agreement from the same credits and benefits . . . Under GM's contention, when the returning veteran steps back on the escalator after his military service, he loses what the non-veteran has gained. We reject the contention because clearly, under SUB, credit units accrue as time passes, whether an employee does or does not work. We think the contention if sustained would discriminate against the veterans by depriving them of an important element of

> seniority due them and would be a "bizarre result" as in *Accardi* and thus offend the liberal Congressional purpose of §9.[5]

As noted above, the "bizarre results" of *Accardi* "have not occurred at Republic, as the facts disclose."

Upon due consideration of *Alabama Power Co. v. Davis, supra*, the additional arguments of counsel since remand, and upon the entire record, this court reaffirms its August 29, 1975 ruling, its findings of facts and conclusions of law. Judgment is granted in favor of the defendant and against the plaintiff.

IT IS SO ORDERED.

---

[5] *Parris* v. *General Motors Corp.*, 75 CCH Lab.Cas. ¶ 10,373 (S.C.Ind. 1974), dealt with the same General Motor's SUB plan and followed *Akers*.

APPENDIX C

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

No. 76-1160.

July 12, 1977.

THOMAS E. COFFY, PLAINTIFF-APPELLANT

v.

REPUBLIC STEEL CORPORATION,
DEFENDANT-APPELLE

On Appeal from the United States District Court,
Northern District of Ohio.

Before WEICK, CELEBREZZE and PECK, Circuit Judges.

PER CURIAM: The judgment of the District Court is vacated and the cause is remanded for consideration in the light of *Alabama Power Co. v. Davis*, [81 LC ¶13,255] ___ U.S. ___ (No. 76-451, decided June 6, 1977) 45 U.S.L.W. 4588.

APPENDIX D

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

No C-74-217.

August 29, 1975.

THOMAS E. COFFY, PLAINTIFF

v.

REPUBLIC STEEL CORPORATION, DEFENDANT.

Before THOMAS, District Judge.

MEMORANDUM AND ORDER

THOMAS, D. J.: Plantiff Thomas E. Coffy sues his employer defendant Republic Steel Corporation to enforce reemployment rights which he claims arise under section 9 of the Military Selective Service Act of 1967, 15 U.S.C. App. §459.[1] In his complaint, filed for him by

[1]The veterans' reemployment provisions have recently been recodified, with nonsubstantive changes in wording, as 38 U.S.C. §§ 2021-2026. See the Vietnam Veterans' Readjustment Assistance Act of 1974, Title IV, § 404(a), Pub. L. 93-508, Dec. 3, 1974, 88 Stat. 1394. All proceedings in this case, however, have gone forward with reference to the previous codification, 50 U.S.C. App. § 459. Therefore, references here are to subsections 9(b) and 9(c)(1) of the 1967 Act, cited in the text. Under subsection 9(b)(B) (i) a person returning to a position in private employment from military service shall "be restored . . . to such

the United States Attorney and counsel of the Department of Labor, he alleges in paragraph VI that:

> Except for plaintiff's military service [September 9, 1969 to August 16, 1971], he would have been entitled to 52 credit units of Supplemental Unemployment Benefits (hereafter S.U.B.) during the period he was laid off, which was from September 10, 1971 to August, 1972.

Continuing the allegations of paragraph VI, plaintiff says

---

position or to a position of like seniority, status, and pay . . . ." Subsection 9(c)(1) specifies that a person restored under 9(b)(A) (federal government employment) or (B) (private employment):

> . . . shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces. . . .

Construing the seniority guarantees in these previous provisions, *Fishgold v. Sullivan Drydock & Repair*, [11 LC ¶ 51,232] 328 U.S. 275, 284–85 (1946), declared that the serviceman

> . . . does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. . . .

Following the *Fishgold* decision Congress added subsection 9(c)(2), that expressly codified the holding of *Fishgold*. Subsection 9(c)(2) reads:

> It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of section 459(b)] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

> Defendant failed and refused to grant plaintiff the S. U. B. due him and paid plaintiff benefits for only (6) months, in violation of Sections 9(B) (i) [sic] and 9(c)(2)[sic] of the Act.

Denying the allegations of paragraph VI of plaintiff's complaint, defendant Republic states that

> . . . plaintiff was paid all S. U. B. benefits due him under the express language of the S. U. B. Plan, and further states that such Plan is not in violation of the Act.

Plaintiff prays

> . . . that defendant be ordered to compensate him for the benefits due him as expressed by the difference between the number of credits he was paid and the amount he would have received if his account had been fully credited; . . . .

Countering, defendant Republic prays that the complaint be dismissed.

Based upon a joint stipulation of facts each party moved for summary judgment supported by briefs. The stipulation of facts sets forth those provisions of the SUB Plan deemed pertinent by the parties. Thereafter at a hearing called by the court the collective bargaining agreement between United Steelworkers and Republic, which incorporated the Plan as part of Article XVIII, as well as the Plan, were made a part of the record. Certain questions raised at this first hearing led to a further hearing at which witnesses familiar with the history and operation of the SUB Plan testified. Their testimony has supplied answers to the questions previously raised by the court. Thus the adjudication of the case has metamorphosed from consideration of cross motions for summary judgment into a trial on the merits in which the record consists of documentary exhibits and oral testimony of knowledgeable witnes-

ses. After the record was closed oral argument of counsel was presented.

I. Supplemental Unemployment Benefits (SUB) is a creature of collective bargaining between the major steel companies (including Republic) and United Steelworkers of America. The first SUB Plan was established in 1956. Pursuant to further collective bargaining the Plan was revised in 1960, effective in 1962, and on later occasions. The latest revision became effective January 21, 1969.

Testimony concerning SUB and the provisions of the Plan was received from Joseph Senturia and James Carney. Mr. Senturia is an associate of Murray W. Latimer, consultant to United Steelworkers of America in the field of pensions and SUB. Mr. Carney is an attorney for U.S. Steel Corporation employed in the general labor and personnel area with emphasis on employee benefits. He has had experience in the drafting and enforcement of the SUB Plan.

Before reciting the facts relevant to the plaintiff's claim, pertinent provisions of the SUB Plan and testimony explaining key provisions will first be reviewed. The plan supplements "state system unemployment benefits" and provides "other benefits related to unemployment." The ensuing description of the plan is taken from the Handbook on Supplemental Unemployment Benefit Plan for Employees of Republic Steel (1969).

A "benefit" under the plan includes "a Weekly Benefit, Short Week Benefit, or relocation allowance." Plaintiff's claim for additional credit units involves Weekly Benefits.

> To be eligible for a Weekly Benefit, an employee must be on a layoff . . . which occurred in a reduction in force or as a result of the permanent shutdown of the plant, department or subdivision thereof; he must have completed two years of continuous service prior to his layoff;. . . .

A person is on "layoff" when because of lack of work in any week ". . . he does not work at all for the company." In addition, he must comply with certain reporting requirements, receive a state unemployment benefit for the week, be available for work, and maintain an active registration with the state employment service. An employee is disqualified from receiving a Weekly Benefit if he quits, he was suspended or discharged, or his unemployment was a consequence of a strike, slowdown work stoppage, picketing, or concerted action under certain described conditions. He is also disqualified if his unemployment results from his refusal to accept a work assignment, which he is required to accept under any applicable labor agreement. Also, he is ineligible to receive a Weekly Benefit for any week under certain other conditions, including any week in which he claims and is eligible for sickness and accident or total disability benefits, or "[w]hen he is in the military service, including training encampments."

Separate provisions apply to "Short Week Benefits." An analysis of these provisions, combined with the testimony of Mr. Carney, makes it clear that "Short Week Benefits" are paid for "partial unemployment." Partial unemployment occurs in any week in which an employee with two or more years of continuous service works, but for fewer than 32 hours.

Section 7.2 of the Plan, entitled "Military Service," provides in its first sentence:

> If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purpose of the Plan to be on leave of absence and shall not be entitled to any Benefit.

Republic rests its defense, in part, on the last sentence of section 7.2 which specifies:

> Only the credit units credited to [an employee] at the time of his entry into such service shall be

credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may otherwise be required by law.

According to section 2 of the Plan, "Duration of Weekly Benefits," the number of weeks for which an employee may be paid a weekly benefit "depends on his number of credit units." He earns a half credit unit for each week in which he has any of the following hours:

a. Hours worked for the Company,
b. Hours not worked but for which he is paid, such as vacation hours or hours for which he received jury allowance,
c. Hours not worked and not paid for but which were lost because:
(1) He was performing his duties as a member of the Grievance Committee, or
President, Vice-President, Recording Secretary, Financial Secretary and/or Treasurer of a Local of the Union which is his collective bargaining representative, or
(2) He was absent because of disability for which benefits are payable under a Workmen's Compensation or Occupational Disease law or the Company Program of Insurance Benefits.
However, an employee will not receive credit for weeks occurring when he has 52 credit units, which is the maximum number he may have.

In the initial (1956) version of the Plan the hours spent in any of the three categories (a through c) were labeled credited hours. An eligible employee accumulated 1/10 of a SUB credit unit for every eight credited hours. Effective in 1962 the parties agreed to the deletion of the proportional requirement and substituted the provision which has been carried forward in section 2.0 to this day. The company recognized that it was unnecessary to relate the accumulation of credit units to the specific number of hours worked because it was unusual for an employee to work less than 32 hours. Witness Carney attributed the minimum 32-hour workweek to the around-the-clock nature of the steel making process and provisions of the labor agreement which would render it infeasible for the company to employ persons one or two hours a day or for only one or two days in any week.[2]

Plaintiff Coffy was first employed by Republic Steel from April 30, 1968, until September 7, 1968, at which time he was laid off and subsequently quit of his own free will. The plaintiff was again employed by Republic Steel as a crane operator from January 24, 1969, until his entry into the armed services on September 9, 1969. His military service continued until August 16, 1971, when he was honorably discharged.

Plaintiff applied for reinstatement on September 14, 1971, at which time Republic was in the process of laying off employees and had passed Coffy's seniority date. In conformance with the "seniority escalator" principle of *Fishgold*, *supra* n. 1, and subsection 9(c)(2), Coffy was reinstated in layoff status and was eventually recalled to work on July 1, 1972. During the period of

---

[2] One of these contractual provisions, Art. 6, § 6 of the union contract, guarantees a minimum of four hours of work, or four hours of pay if no work is available, if an employee reports for work as scheduled or notified. Mr. Carney regarded the "Short Week Benefit" provision of the SUB Plan as the company's most significant incentive to utilize employee time fully. He explained that this article, § 4 of the SUB Plan, essentially requires the company to pay an employee for 32 hours of work in any week in which the employee works for some but less than 32 hours. Because of this contractual requirement it is not financially feasible to schedule operations in which employees do not work a minimum of 32 hours in any but the most unusual conditions. A third provision, Art. X, § 7 of the basic labor agreement, results in scheduling employees at least four days a week. It requires the company to consult with the grievance committee whenever a decrease of work ". . . results in the reduction to an average of 32 hours per week for the Employees in the seniority units and a further decrease of work appears imminent. . . ."

layoff he received SUB from Republic for approximately six months (approximately 25 credits).[3]

The parties agree that plaintiff Coffy would have been entitled to 52 SUB credits at the time of his layoff had he been working at Republic rather than engaged in military service. Thus the issue joined by the parties concerns the plaintiff's claimed entitlement to the accrual of credit units during his period of military service.

II. Plaintiff argues that accrual of credit units for weekly benefits payable under the SUB Plan is a "perquisite of seniority," a term Mr. Justice Black originated in *Accardi v. Pennsylvania R. Co.*, [53 LC ¶ 11,073] 383 U.S. 225 (1966). The Court held that the severance payments in that case were "just as much a prerequiste of seniority as the more traditional benefits such as work preference and order of lay-off and recall." *Id.* at 230. Since perquisites of seniority are guaranteed to him under the Court's broad reading of "seniority" in section 9, the plaintiff argues that he is entitled to accrual of SUB credit units during his period of military service, as a "perquisite of seniority."

Meeting this argument defendant points to the Supreme Court's amplification of *Accardi* in *Foster v. Dravo Corp.*, [76 LC ¶ 10,658] 420 U.S. 92 (1975), affirming [72 LC ¶ 14,194] 490 F.2d 55 (3 Cir. 1973). Applying *Foster*, defendant insists that entitlement to weekly benefits under the SUB Plan constitutes "other benefits" under section 9(c)(1), which are governed by the Plan

> . . . pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with [Republic] at the time [the plaintiff] was inducted into [the armed forces]. . . .

[3] Republic Steel erroneously credited Coffy with his previous employment in 1968 for SUB purposes, and as a result is currently deducting $20 per pay period to recover approximately $322 in benefits (approximately 9 credits) he allegedly was overpaid.

In denying the plaintiff SUB credit units during his military service defendant Republic says it acted in accordance with the last sentence of section 7.2 of the Plan, which provides that "[o]nly the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an Employee of the Company. . . ."

In *Foster v. Dravo Corp.*, *supra* the question presented was whether section 9 of the Act

> entitle[d] the veteran to vacation benefits when, because of his departure for military service, he has failed to satisfy a substantial work requirement upon which the vacation benefits are conditioned.

420 U. S. at 93–94. The collective bargaining agreement between Foster's union and Dravo required employees to work a minimum of 25 weeks in each calendar year in order to earn full vacation benefits. Foster was denied vacation credits for the two-year period during which he served in the military. He claimed that

> . . . since he would have earned two vacations if he had worked for respondent throughout the time he was in service, § 9 of the Military Selective Service Act requires that he be credited with the benefits even though he failed to meet the 25-week work requirement in either year.

490 U.S. at 95. Both the trial court and the appellate court denied Foster's claim; the Supreme Court affirmed.

Petitioner Foster relied on *Accardi*, *supra* and *Eagar v. Magma Copper Co.*, [56 LC ¶ 12,335] 389 U.S. 323 (1967). In *Eagar* a per curiam opinion relying on *Accardi* reversed a judgment for the company, which had denied a veteran's right to vacation pay and holiday

pay. Justice Marshall's opinion in *Foster* explicates *Accardi* thus:

> The dispute in that case concerned a veteran's eligibility for a severance payment. Under the applicable collective bargaining agreement, the amount of severance pay due each employee depended on the length of the employee's "compensated service" with the respondent railroad. The railroad argued that the act was inapplicable because the amount of the severance payment did not depend directly on seniority. The Court, however, took a broader view. Looking beyond the narrow characterization of seniority rights in the collective-bargaining agreement, the Court concluded that the severance payments were not intended as a form of deferred compensation for work done in the past, but rather as a means of compensating employees for the loss of rights and benefits accumulated over a long period of service. Accordingly, the Court held that the severance payments in that case were "just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall."

420 U.S. at 98 (citations omitted). *Foster* then distinguishes *Accardi* and *Eagar*.

> Petitioner argues that under *Accardi* and *Eagar* the vacation benefits in this case must be granted to him as a returning serviceman because the entitlement to a vacation is not closely correlated to the amount of work actually performed by the employee. Under the collective-bargaining agreement, a Dravo employee theoretically could earn full vacation benefits by doing as little as one hour's work in each of 25 weeks during the year. From this, petitioner concludes that the agreement really conditions vacation benefits only on continued employment, and that Dravo therefore could not legally deny him full vacation benefits for either 1967 or 1968.

Id. at 99. The Court determined that such an approach would extend the statute beyond the limits of prior cases. It then fashioned the following rule:

> Generally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation. Of course, as in the *Accardi* case, the work requirement may be so insubstantial that it appears plainly designed to measure time on the payroll rather than hours on the job; in that event, the Act requires that the benefit be granted to returning veterans. But where the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee.

Id. at 99–100.

The decision in this case, applying the essence of *Foster*, turns on whether the Plan's SUB credit units are "designed to measure time on the payroll rather than hours on the job," and whether the qualification for credit units is a "work requirement [that] constitutes a bona fide effort to compensate for work actually performed."

As previously seen the particular qualifications for SUB credit units have remained the same price since 1962, seven years before the plaintiff left his position at Republic to enter the armed forces. Under section 2 of the Plan an employee is credited with ½ credit unit "for each week . . . in which he has any of [three types of] hours." The first type is "hours worked for the Company." Although this appears to be a "work requirement," as explicated in *Foster*, the government questions the bona fides of such an assertion. Obtaining a concession from Mr. Senturia that there is no minimum number of hours required to be worked in any week to qualify for a ½ credit unit, Government counsel asked

Mr. Senturia "would one hour be sufficient?" He answered,

> Well, one hour theoretically would; although I think as a matter of [the Labor] Agreement, an employee would not be paid just for one hour.

The uncontradicted testimony of Mr. Carney conclusively shows that the possibility, elicited in the questioning of Mr. Senturia, of an employee working only one hour in any week and thereby qualifying for SUB bears no relationship to actual practice in the industry. Under conditions existing at Republic and other steel mills, it is very unusual for an employee to work less than 32 hours in any week. Mr. Carney attributes this minimum period (1) to the round-the-clock nature of the steelmaking process and (2) to provisions of the collective bargaining agreement which render it infeasible to employ persons one or two hours a day or for only one or two days in any week. These provisions are summarized at Note 2, *supra*.

Hence, it is concluded that "hours worked for the Company" in any week, the first qualification for earning a ½ credit unit, meets the *Foster* test of a "work requirement." It constitutes a bona fide effort to relate qualification for weekly benefits under the SUB Plan to work actually performed, and is designed to measure "hours on the job," rather than "time on the payroll."

The other two types of hours in a workweek that earn a ½ credit unit, *supra* at 5 are (b) hours paid for but not worked, "such as vacation hours or jury allowance," and (c) "hours not worked and not paid for" but lost because of (1) performance of designated local union duties or (2) absence from work due to disability for which benefits are payable under a workmen's compensation or occupational disease law "or the Company Program of Insurance Benefits." Categories (b) and (c) are characterized by witness Carney as "wage substitutes." He explained that SUB credits are awarded under circumstances such as these in which tradi-

tionally steel corporations had paid compensation in the form of wages and wage substitutes. With regard to credits given to local union officials for the performance of their duties, he explained that these officials are attached to the work force and work in the plant when not performing their union duties. Union duties performed as members of grievance committees or as local officers are patently work related.

Traditionally recognized in the steel industry as wage substitutes, the hours in any week which earn an employee a ½ credit unit under the Plan's sections 2(b) and (c) are reasonably justifiable parts of total SUB plan. Just as "hours worked for the Company" in any week constitute a valid "work requirement" qualifying a person for a ½ credit unit, the Plan's specification that only an employee engaged in a work-related substitute activity may receive SUB credits establishes a valid work requirement.[4] In both situations the *Foster* test is satisfied.

---

[4] On the record before the Court in *Foster* the Court's use of the term "work requirement" must be found to have a broader meaning than hours actually worked. Dravo's collective bargaining agreement with the union that established vacation pay, the subject of the *Foster* suit, provided that in the computation of "hours or shifts worked by an employee for purposes of determining . . . vacation pay," hours or shifts worked included:

a. Shifts or parts of shifts lost by employees when unable to work on account of injuries sustained by accident arising out of and in the course of their employment. . . .

b. Shifts or parts of shifts lost by employees on days when they report to work as required, but are not put to work or are sent home before the end of the shift for any reason beyond the employee's control.

. . .

d. Shifts lost because of absence on jury duty for which the employee is paid . . . .

e. Shifts lost because of absence on union business paid for by the Union in connection with contracts with Dravo Corporation . . . .

f. Hours lost by Officers of the Union and the members of the Negotiating, Grievance and Pension Committees while out of

Plaintiff leans on *Hoffman v. Bethlehem Steel Corp.*, [70 LC ¶ 13,562] 477 F. 2d 860 (3 Cir. 1973), which examined the same steel SUB Plan under consideration here. An employee returning to his employment with Bethlehem after a period of military service sought and was denied in the trial court SUB credits for his period of military service.

In reversing, the court of appeals observed:

> Here the learned trial judge observed that Bethlehem's SUB benefits are accrued based on hours worked as spelled out in section 2.0(c)(1)(ii) of the SUB Plan. However, when that plan is analyzed, the same "bizzare results" are possible under Bethlehem's plan as were possible under *Accardi*. In *Accardi* the court noted absolutely no distinction was made between a man that worked one day a month for seven months and one who worked 365 days. This fact made it obvious that severance benefits did not in fact depend upon hours work [sic] but upon seniority. Similarly, in Bethlehem's plan no distinction is made between an employee who works 1 hour during the week and one who works 40 hours during the week. Each would accrue one-half of a SUB credit. It is illogical to say that a plan which permits the accrual of benefits to employees who worked 7 days out of 365 is based upon the passage of time while a plan which permits the accrual of benefits to an employee who works 1 hour out of 40 is based upon something more than the passage of time. In each,

---

the Plant on Union business connected with the Dravo Corporation . . . .

Agreement between Dravo Corporation, Engineering Works Division, Neville Island Heavy Metals Plant, Pittsburgh, Pa. and Industrial Union of Marine and Shipbuilding Workers of America, Local Union No. 61, AFL-CIO, 1966-1968, § 5. These provisions are substantially the same as the provisions of sections 2.0(b) and (c) of the SUB Plan, established pursuant to the collective bargaining agreement between Republic and the United Steelworkers of America.

> the employee receives credit for a full-time period regardless of the fractional part of the period which he works.

Id. at 863-64. The court then found that "the SUB credits accrued pursuant to this Plan are seniority rights and as such are protected by § 9(b)." *Id.* at 864.

Section 2.0 of the Bethlehem SUB Plan thus construed is identical with section 2.0 of the Republic SUB Plan. However, it is apparent that the court of appeals interpreted section 2.0 without benefit of the factual record developed in the present case. The facts relating to the steel industry received by this court are not mentioned in either the opinion of the court of appeals or the opinion of Judge Gourley, 335 F. Supp. 968 (W.D. Pa. 1972).

Circumstances existing in the steel industry, as revealed by the uncontradicted evidence in this case, demonstrate that, in practice, the minimum workweek is 32 hours. Therefore, it was unrealistic for the court of appeals to say in *Hoffman* that the SUB Plan makes "no distinction . . . between an employee who works 1 hour during the week and one who works 40 hours during the week." The Plan must be construed in light of actual conditions in the steel industry. The possibility of an employee working only one hour during any week does not exist. Yet upon this hypothesis, the court concludes that "when that plan is analyzed, the same 'bizzare results' are possible under Bethlehem's plan as were possible under *Accardi*." Given the universal employment practices of the steel industry the "bizzare results" of *Accardi* could not have occurred at Bethlehem, and have not occurred at Republic, as the facts disclose.

In distinguishing *Hoffman* in *Foster v. Dravo Corp.*, *supra* the court of appeals states:

> Thus, like the agreement in *Accardi*, the *Hoffman* contract contained an express provision that permitted a "bizarre result;" that is, an em-

ployee who worked one hour each week could accrue as much SUB credit as one who worked forty hours a week.

490 F.2d at 59. Relying on this language from *Hoffman*, distinguished but not overruled by the court of appeals in *Foster*, plaintiff's counsel at oral argument sought to find support from the Supreme Court's affirmance of the court of appeal's decision in *Foster*. Since the Court's opinion is silent on *Hoffman*, plaintiff's argument is strained at best. But more importantly, the Court's grounds for distinguishing *Accardi*, on which *Hoffman* relied, in *Foster* render untenable the plaintiff's argument that the Supreme Court decision in *Foster* offers an implied approval of *Hoffman*. Indeed, the Court's language in *Foster* cuts the other way. It expressly holds that, unlike the *Accardi* situation,

> . . . where the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee.

420 U.S. at 99–100. At most it is arguable that the work requirement "correlates only loosely with the benefit" of SUB credits under section 2.0 of the SUB Plan. Actually, as previously indicated, section 2.0 contains a "work requirement that constitutes a bona fide effort to compensate for work actually performed," or for work related substitutes for work performed. Hence, the correlation of the SUB credits with the work requirement, even if a loose one, "is not enough to invoke the statutory guarantee" of seniority.

The court of appeals in *Foster* indicated that in *Hoffman*

> . . . the Court was confronted with a contract granting employees on leaves of absence for certain enumerated reasons [i.e., vacation pay, jury duty,

> performing responsibilities as a union officer, or disability due to a work connected injury] the right to accumulate SUB credits, while denying such rights to employees on leave for other reasons.

490 F. 2d at 59. This conclusion is not consistent with the collective bargaining agreement in the steel industry. The agreement does not classify as leave of absence any of those conditions: vacation time, jury duty, time spent performing responsibilities as a local union officer, or time off due to a disabling work connected injury. On the contrary, the record in this case shows that the steel industry recognizes these situations as "wage substitutes," clearly inconsistent with a leave of absence status. However, the collective bargaining agreement does recognize several conditions as warranting a "leave of absence." For example, ". . . leaves of absence for the purpose of accepting positions with the International or Local Unions . . ." are recognized under Article X, Section 10 of the collective bargaining agreement. Yet, the SUB Plan does not grant SUB credits for this or any other leave of absence. Hence, neither the SUB Plan, the steel industry collective bargaining agreement, nor employment practices of the industry warrant *Foster's* statement that

> [t]his case does not present a dilemma like the one this Court faced in *Hoffman*—some employees on leaves of absence received SUB credits under the agreement while others did not.

490 F.2d at 63. On the entire record it is concluded that the leave of absence status granted the plaintiff while in the military service by virtue of section 9(c)(1), and also granted under section 7.2 of the SUB Plan, does not fall unequally or inequitably on the plaintiff. Other persons granted leaves of absence under the collective bargaining agreement do not earn SUB credits while on leave of absence.

III. It is concluded, therefore, that neither *Accardi* nor *Hoffman* controls this case. Qualification for SUB credit units does not depend upon mere passage of time. During his period of military service it is determined that plaintiff did not automatically accrue SUB credit units, as a "perquisite of seniority." Consequently, section 7.2 of the SUB Plan barring the plaintiff from receiving SUB credit units during his period of military service is valid and enforceable under section 9(c)(1) of the Act.

Upon the stated grounds and for the foregoing reasons judgment is granted in favor of the defendant and against the plaintiff.

It Is So Ordered.

APPENDIX E

No. 78-3266

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS E. COFFY, PLAINTIFF-APPELLANT,

v.

REPUBLIC STEEL COPORATION, DEFENDANT-APELLEE

ORDER

[Filed: Feb. 16, 1979]

Before: WEICK, CELEBREZZE, Circuit Judges and PECK, Senior Circuit Judge.

Upon consideration of the petition for rehearing with the suggestion that it be heard en banc, and a majority of the active judges of this court not having voted for rehearing en banc, the petition to rehear was referred to the hearing panel.

Upon consideration, the court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/John P. Hehman
Clerk